Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED
STATES OF AMERICA

Philip Washburn, M.D.
Petitioner

versus

United States Department of Justice et.al.

respondent(s)

On Petition for Writ of Certiorari
In The 10th Circuit Court of Appeals
Case 03-4058

PETITION FOR WRIT OF CERTIORARI

Philip Washburn, M.D.
Pro Se Petitioner
251 West Hwy 198 Suite # 3
Salem, Utah 84653
(801) 423-3267
423-3276 Fax

QUESTIONS PRESENTED FOR REVIEW

August 24, 1995, September 21, 1995 and October 20, 1995, respondant's sent a Confidential informant named Retha Mae Stanton into petioner's medical office, disguised as a patient and equipted with a bodywire transmitting device. Patient was prescribed # 100 Loritab, # 90 Valium and # 30 Prozac, per month, for chronic pain, muscle spasms and depression from automobile rollover accident in July of 1995. Retha Mae Stanton was seen monthly until April 1996, when she was referred by petioner to an orthopedic surgeon for neck surgery. Respondants accused petioner of over prescribing controlled substances for the prescriptions written for Retha Mae Stanton.

Q. Whether evidence obtained is admissible by the government through means of deceptively placing a secret informant, disguised as a patient in an examination room of a physician, without warrant, for the sole purpose of obtaining evidence to initiate probable cause proceedings in terminating federal and state controlled substance prescribing license's.

June 01, 1996, respondants entered petioners medical office without notice, detained petioner, interrogated petitioner for 2 hours despite petioner's request for counsel.

Q. Whether a person is entitled to representation when held by numerous federal and state agents, alone and questioned

repeatedly and extensively regarding suspicions agents have alledging criminal activity.

June 03, 1996, DEA Agent Robert Johnson and several of the listed respondants entered petioners medical office and searched petioners private patient charts and seized several records without warrant.

Q. Whether evidence obtained by government agents is admissible in administrative and or criminal proceedings when federal agents search patient chart notes without court ordered authority.

June 07, 1996, Respondant's entered petioner's medical office, without notice, detained and interrogated petioner in a separate room in the building and personally prepared a hand written confession that respondants required petioner to sign, after requests for counsel, which were denied, effectuating the surrender of petioner's controlled substance license.

Q. Whether confessions obtained by state administrative and or law enforcement agents are admissible, when hand written by these agents and then signed, under duress, by the individual held during questioning.

March 1997, April of 1998 and August of 2001, petioner re-applied for Utah State and Federal Drug Enforcement Agency controlled substance license.

These several applications for licensure were denied due to Utah administrative law R156-46b-202(A)(K) that prohibits any further agency review except the stipulation and order 96-160 that is on file.

Q . Whether Utah Administrative law, that denies formal hearing review after surrender of a prescribing license, is in violation of the Due Process and Equal Protection clauses of the United States Constitution.

Petioner continues to practice limited medicine in Utah. He has passed competency testing for controlled substance prescribing in February 1997, February of 1998 and June of 2001. The Drug Enforcement Agency had denied licensure due to the Utah Occupational and Professional licensing stipulation and order, Docket file 02-17, State of Utah refuses to review the stipulation and order. Petioner has no recourse for controlled substance licensure in Utah or any other state due to Utah Administrative review restriction and federal regulatory law.

Q . Whether the question of regulatory taking of petioner's prescribing license and denial of all economically viable uses of said property without compensation and the lack of post-deprivation remedies are proper questions for which a jury could award relief.

PARTIES TO PROCEEDING

Philip Washburn, M.D.

petitioner

versus

United States Department of Justice
Drug Enforcement Agency (DEA);
Gregg Williams, DEA agent,
Scott Meadows, DEA agent
Donald W. Medrala, DEA agent,
Robert Johnson, DEA agent
State of Utah;
Department of Commerce,
Utah Attorney General Office;
R. Paul Allred, Assistant Attorney General
Utah Division of Occupational and Professional
Licenseing, (DOPL);
J. Craig Jackson, Director, DOPL,
Don W. Rodgers, DOPL agent,
David Bancroft, DOPL agent,
County of Utah;
Utah County Attorney General Office,
Craig R, Madsen, Criminal Division Chief
and Assistant County Attorney,
Utah County Narcotic Enforcement Taskforce,
Officer Russell Billings,
Officer Devone Jensen,
Officer Jerry Harper, Officer Lee Fox,
Utah County Sheriff Detective Patty Johnson
City of Provo

Respondants

PRIOR APPEALS

Petioner filed appeal in the 10th Circuit Court of Appeals, Case number 03-4058, entered February 23, 2003.

OPINION OF THE 10TH CIRCUIT COURT

The honorable Judges Ebel, Henry and Murphy Affirmed the ruling of the District Court, State of Utah, Central Division, case no. 2:01 :CV-00268 Paul G. Cassell, entered February 10, 2004.

JURISDICTIONAL STATEMENT

Jurisdiction is based on 28 U.S.C. section 1291, 28 U.S.C. section 1331 and 28 U.S.C. section 1343 (a)(1)(2)(3)(4).

CONSTITUTIONAL OR STATUTORY PROVISIONS

Petioner's appeal to the 10th Circuit Court and the District Court requested review of respondant's administrative/criminal investigation of petioner's prescribing of Tylenol and controlled substances Constitutional violations that occurred in obtaining coerced confession and subsequent regulatory taking of petioner's prescribing priviledges, contrary to the 4th, 5th, 6th , 7th and 14th amendments of the United States Constitution. The District Court and the 10th Circuit Court failed to review the investigative procedure and constitutional

violations that led to the permanent termination of petioner's federal and state license's to prescribe controlled substances. Petioner requests remand for jury trial under the 7th amendment.

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STATEMENT OF THE CASE

This is a civil rights case under 42 USC section 1983, 1985 and 1986 for original jurisidiction in the United States Supreme Court for trial by Jury or for remand to the District Court for Trial proceedings pursuant to 28 USC section 1651.

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ARGUMENT INTRODUCTION

May 01, 2001, Petioner/Plaintiff, Philip Washburn, M.D. filed the civil action against Respondant/Defendants, U.S. Department of Justice et al. in District Court, Case No. 2:01-CV PGC by the 6 year statute of limitations allowed by 28 USC section 2401(a).
October 25, 2001, the Honorable Judge Tena Campbell denied respondants motion to dismiss based on illegal search and seizure, *Wolf v. Colorado* 388 US 25, 69 (1949) and *Mapp v. Ohio* 367 US 643, 647 (1961), Docket at 71 (see appendix F).

Judge Campbell heard oral arguments on this case November 5, 2001. The case was then reassigned to Judge Paul G. Cassell on February 1, 2002. On August 23, 2002, Judge Cassell assigned magistrate judge Samuel Alba to provide a bench ruling. February 3, 2003, Judge Alba entered his report and recommendation, Docket at 105 (see appendix A). February 10, 2004, the Honorable Judge's Ebel, Henry and Murphy of the 10th circuit court of appeals affirmed Judge Alba's report and recommendation (see appendix B). Judge Alba indicated respondants/defendants

investigations revealed petioner was over-prescribing Tylenol and doing research without a license, 23 USC section 823 (f). Judge Alba in his report and recommendation granted respondants/defendants motion to dismiss.

Petioner, Philip Washburn, M.D, who has been in practice for 32 years and was a court appointed examiner and expert witness for the State of Utah for 20 years and past medical director of Utah State Hospital Youth, Adult and Geriatric Units, is seeking a civil trial by jury, to determine whether his prescribing practices were within medical guidelines and limits of the law and to determine whether evidence that was obtained by Federal and Utah State government agents, without warrant, is admissible. Petioner made jury demand on February 21, 2003 according to 42 USC section 1985 (3) deprivation of civil rights under color of law against a protected class, petioner is Commanche Indian, Docket at 106. Petioner is seeking $ 120,000,000.00 in compensation for Damages. Petioner filed opposition memoranda To Judge Alba's report and recommendation on February 23, 2004, Docket at 108 requesting review of the Utah Administrative law R156-46b-202 (A)(K) that prohibits hearing after surrender of controlled substance license is in violation of the Due Process and Equal Protection clauses of the US Constitution.

FACTS OF THE CASE

Monday, June 03, 1996, Federal Drug Enforcement agent, Robert Johnson, respondant/defendant accompanied

representatives from the Utah State Attorney General's office, Utah Division of Occupational and Professional licensing (DOPL) and Utah County sheriff and Provo City police in searching petioner's medical office and confidential patient chart notes without notice and without warrant. Agents interrogated petioner, alone, for 2 hours, *McNabb v. United States 318 US 332 (1943)* Without the aide of counsel, *Gideon v. Wainwright 372 US 344.* Petioner repeatedly asserted that he had done nothing illegal or improper. Petioner repeatedly requested that the charges against him be made available but was refused counsel and or any information regarding said charges.

Wednesday, June 05, 1996, respondant/defendants again entered the medical office of the petioner and searched the medical chart notes and held petioner against his will, interrogated him for another 2 hours without the aide of counsel and without warrant. No confession was obtained by these agents. Petioner asserted that " he had practiced good, ethical medicine " and again requested information regarding the nature of the charges, but was refused counsel and information.

Friday, June 07, 1996, Federal and State law enforcement agents accompanied a Dr. Charles Walton, who represented the respondant/defendants Utah Division of Commerce, Utah Attorney general's office and the Utah Division of Occupational and Professional licensing, entered the medical office of the petioner, again without warrant.

Dr. Walton and law enforcement conducted a lengthy interrogation of petioner with regards to his prescribing of controlled substances. Petioner, again requested counsel regarding the charges and was denied, *Katz v United States 88 S Ct 507.* Respondants/defendants threatned the petioner that the current investigation would be prosecuted criminally if petioner did not surrender his controlled substance license and sign a hand written statement that the agents prepared, formally known as Division of Occupational and Professional licensing stipulation and order 96-160 (see appendix C) that permantly terminated petioner's Utah State and Federal priviledge to prescribe schedual II-V controlled substances.Under duress, petioner signed the agents hand written note and surrendered his wallet copy of his prescribing license to the agents *Escobedo v Illinois 378 US 478.* Petioner was refused a hearing required by Utah Code Annotated 58-12-35.1, 63-46b-8(1)(d) thru (f) and Due Process rights and his right against self-incrimination *Malloy v Hogan 378 US 1 (1964).*

Tuesday, June 11, 1996, Respondants for the Utah Attorney general entered the medical office of the petioner and presented a formally prepared DOPL stipulation and order 96-160 for petioner to sign without the chance to obtain counsel.

Department of Justice, Drug Enforcement agency administrative law judge Gail A. Randall ruled (see appendix E) that petioner's federal application for licensure to prescribe was denied due to the Utah division of

Occupational and Professional licensing stipulation and order 96-160, yet, Department of Justice, Drug Enforcement agency charges of " doing research with a controlled substance without a license " 21 USC section 823 (f) were not supported by the Utah Division of Occupational and Professional licensing stipulation and order 96-160. Neither of these government agencies allowed hearing and or chance to obtain counsel prior to the petioner's surrender of license. Petioner's federal and state license to prescribe were permantly terminated based on these unrelated charges without separate indictment, *Hurtado v California 110 US 516* and without having access to counsel, *Powell v Alabama 287 US 45 (1932).*

Surrender of a license is a formal adjudicative action finalized by Utah Division of Occupational and Professional licensing division manager J.Craig Jackson, that denied re-licensure hearing pursuant to Utah Administrative law R156-46b-202(A)(K).

Further re-application for licensure, by petioner in March 1997, April 1998 and August 2001 were all denied by Utah Division of Professional licensing and Federal Drug Enforcement Agency due to the DOPL stipulation and order 96-160. Utah Administrative law R 156-46b-12(7) and UCA 63-46b-16a(4) does not allow for any other type of agency review for re-licensure, except for review of the agency record, which consists of the stipulation and order 96-160. This administrative taking policy and law rendered

petioner without remedy or relief and seems unconstitutional *City of Monterey v Del Monte Dunes, LTD 526 US 687 (1999).*

May 15, 2002, Respondant, Utah Division of Commerce director, Ted Boyer denied petioner licensure pursuant to Utah administrative law R156-46b-12(7) and UCA 63-46b-16a(4) and Due to the Division of Occupational and Professional licensing stipulation and order 96-160.

Petioner has exhausted his administrative remedies and has been denied licensure due to stipulation and order 96-160 and the limits of Utah administrative law procedure that seem to be in conflict with the Due Process and Equal Protection clauses of the US Constitution.

The respondants procedure in obtaing the stipulation and order and the validity of the stipulation and order are the main points of review requested by petioner in district court and the 10 circuit court of appeals. Neither court reviewed the investigative procedure of the respondants.

SUMMARY

Petioner requests a trial by jury to assess constitutional violations under the 4th, 5th, 6th, 7th and 14th amendments and UCA 77-17-10 and seeks relief under 42 USC section 1983. Petioner requests compensation for administrative taking procedures that limited his practice of medicine and severely

prejusticed his reputation as a physician and citizen are proper questions on which a jury would award relief.

Signed this 28th day of April, 2004

/S/ Philip Washburn MD

_____

Philip Washburn, M.D. Petioner

See appendix G for Utah division of occupational and professional licensing report # 950853-8461

APPENDIX A

REPORT AND RECOMMENDATION
Entered February 3, 2003

IN THE UNITED STATES DISTRICT
COURT DISTRICT OF UTAH
CENTRAL DIVISION

Philip Washburn
Plaintiff

Report and Recommendation
v. Case no. 2:01-CV-268PGC

United states department
Of Justice; Drug Enforcement
Agency et.al.
Defendants

This action was brought by pro se plaintiff, Philip Washburn, seeking relief under 42 USC section 1983, 1985 and 1986. Before the court are six motions filed by the defendants in this case. See file entries # 82, 84, 89, 92, 95. Those motions request that the court either dismiss the case or grant summary judgement in their favor. The court has carefully considered the parties memoranda, oral arguments, and the entire record before the court and hereby makes this report and recommendation.

BACKGROUND

In June 1995, the Division of Occupational and Professional licensing (herafter DOPL) opened an investigation into plaintiffs prescription

practices. See file entry # 90, exhibit 1. During approximately the same time period, the Utah county Narcotics enforcement taskforce (herafter NET) also investigated plaintiffs prescription practices. See file entry # 85 exhibit 2. Part of the investigations involved sending an informant wearing a body wire to plaintiffs office, resulting in the recording of the informants conversation with plaintiff. The investigations revealed that plaintiff was overprescribing controlled substances and was not following proper medical guideline. See file entry # 90, exhibit 3.

On June 11, 1996, plaintiff signed a stipulation and order IN THE MATTER OF THE LICENSE OF PHILIP WASHBURN, MD to Practice medicine and to administer and prescribe controlled substances in the State of Utah, case number 96-160, a case pending before DOPL. See file entry # 96, exhibit 1. In that stipulation and order, plaintiff voluntarily surrendered his controlled substance license. See id. Part of what plaintiff agreed to in that stipulation was the following:

Respondant [plaintiff] recognizes the division has commenced an investigation into issues relating to respondant's prescribing of controlled substances. To avoid the potential for being subjected to the investigation and disciplinary process, respondant surrenders his controlled substance license. Respondant further agrees he will not reapply for a controlled substance license in the future.Id. Plaintiff acknowledged that he was signing the stipulation " voluntarily " without any

inducement by the Attorney General's office, and that the stipulation, upon approval by the DOPL director, would be " the final compromise and settlement of this matter ". Id. The DOPL director approved the stipulation by order dated June 18, 1996. See id.

On August 22, 1996, Defendant Scott Meadows, acting agent in charge of the DEA office in Salt Lake City, wrote a letter on behalf of defendant Gregg Williams, the special agent in charge of the rocky mountain division, informing plaintiff that the DEA had received information from the DOPL on August 21, 1996, that plaintiff had surrendered his Utah controlled substance license to DOPL, effective June 18, 1996. SEE file entry # 96, exhibit 2. Agent Meadows explained to plaintiff in that letter that the DOPL action terminated plaintiff's authority to prescribe, administer, dispense, or otherwise handle controlled substances in Utah. See id. Agent Meadows explained that as a result of that loss of authority, plaintiff's DEA certificate of registration was subject to revocation and that the DEA was in the process of requesting revocation proceedings. See id. Agent Meadows offered plaintiff the opportunity to waive his right to a hearing and to voluntarily surrender his DEA registration by completing DEA form 104, voluntary surrender of controlled substance priviledges form. See id.

On August 10, 1996, plaintiff signed the DEA form 104, thereby voluntarily surrendering his controlled substance priviledges and his DEA certificate of registration. See file entry # 96,

exhibit 3. By signing that form, plaintiff agreed that the form " shall be authority for the administrator of the Drug enforcement administration to terminate and revoke my registration without an order to show cause, a hearing, or any other proceeding ". Id. On September 18, 1996, the DEA received the DEA form 104, and on approximately September 23, 1996, agent Meadows approved the surrender of registration. See file entry # 96, exhibit 4.

On January 27, 1997, the Utah county attorney's office sent memorandum to officer Russell Billings indicating why the county was not going to criminally prosecute plaintiff. See file entry # 85, exhibit 1.

On April 19, 2001, plaintiff filed his original complaint in this action, and the case was assigned to United States District Judge Bruce S. Jenkins. See file entry #1. In May 2001, Judge Jenkins recused himself from the case and the case was reassigned to United States District Judge Tena Campbell. See file entry # 28. In August 2001, this case was referred to United States Magistrate Judge Samuel Alba pursuant to 28 USC section 636 (b)(1)(A). See file entrys # 56, 61. Following a hearing on November 19, 2001, Judge Campbell dismissed plaintiffs complaint.and granted leave for plaintiff to file an amended complaint within twenty days of the court's November 28, 2001 order. See file entries # 75, 76.

Plaintiff filed an amended complaint on

December 7, 2001, seeking relief under 42 USC section 1983, 1985(3) and 1986. In the amended complaint, plaintiff alleges violations Of the Fourth, Fifth, Seventh and Fourteenth amendments. Plaintiff seeks damages of $ 120,000,000.00.

On December 7, 2001, the Department of Justice (herinafter DOJ) and the Drug Enforcement agency (herinafter DEA) filed a motion to dismiss and a supporting memorandum. See file entries # 82, 83. On December 28, 2001, a motion for summary judgement was filed by defendants Provo City, Billings, Jensen and Harper, (herinafter collectively referred to as " the Provo city defendants) with supporting memorandum. See file entries # 84, 85. Also on December 28, 2001, the Utah county attorney's office filed a motion to dismiss and supporting memorandum. See file entries # 86, 87. On January 14, 2002, a motion to dismiss and for summary judgement, with supporting memorandum, was filed by the Department of Commerce; the Utah State Attorney general office; the DOPL; J. Craig Jackson, DOPL director, and Don W. Rodgers, the DOPL investigator, (herinafter collectively referred to as the " Utah State defendants") See file entries # 89, 90. On February 22, 2002, Utah County, Craig R. Madsen, Officer Lee Fox and Officer Patty Johnson (herinafter collectively referred to as " the county defendants") filed a motion for summary judgement with a supporting memorandum. See file entries # 92, 93. On July 16, 2002, a motion to dismiss was filed by

Michael A. DeMarte, Robert Johnson, Scott Meadows, Donald W. Mendrala and Gregg Williams (herinafter collectively referred to as " the DEA individual defendants ") with supporting memorandum. See file entries # 95, 96. Plaintiff has not filed a written response to any of these motions, although he did respond to them in oral arguments.

On July 9, 2002 the case was reassigned to United States Judge Paul G. Cassell. See efile entry # 94. On July 28, 2002, Judge Cassell referred to case to magistrate Judge Alba pursuant to 28 USC section 636 (b)(1)(B). See file entry # 98. On October 15, 2002, magistrate Judge Alba held a hearing on the outstanding motions to dismiss and for summary judgement. Se file entry # 104.

ANALYSIS

The court has before it the six motions listed above asking for dismissal and or for summary judgement. The court will address each of these motions in turn.

However, first the court addresses plaintiffs claims brought under 42 USC 1985(3) and 1986.

A. Section 1985(3) and 1986 Claims

In his amended complaint, plaintiff seeks damages for alleged violations of his constitutional rights under 42 USC section 1983, 1985(3) and 1986. However, in order to support a section 1985(3) claim, plaintiff "

must be a member of a statutorily protected class, and the actions taken by defendant(s) must stem from plaintiff's membership in the class ". *Silwood v. Kerr-McGee Corp.*_F.2d 743, 746 (10th Cir. 1980). 637 Cert. Denied, 454 US 833, 102 S.Ct. 132 (1981); see also *Wilhelm v. Continental Title Co.*720 F.2d 1173, 1175-76 (10th Cir. 1983) cert. Denied 465 US 1103, 104 S.Ct. 1601 (1984); *Ward v St Anthony Hosp.*_476 F.2d 671, 676 (10th Cir. 1973). Nowhere in his complaint has plaintiff alleged that he was a member of a particular class, racial or otherwise. Because plaintiff has failed to show class based discrimination, this court is precluded from invoking section 1985 jurisdiction. This court therefore recommends that plaintiff's section 1985(3) claim be dismissed for lack of jurisdiction. See Fed. R. Civ. P. 12 (h)(3).; see also, *Levering & Garrigues v Morrin*_289 US 103, 105-06, 53 S. Ct. 549, 550 (1933) (explaining that jurisdiction is wanting where claim set forth in pleading is plainly unsubstantial).

Similarly, this court may not invoke section 1986 jurisdiction. Section 1986 provides, in part:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to to do, if such wrongfull act be committed, shall be liable to the party injured...

42 USC section 1986. A claim under section 1986 must also, to some extent, state a case under section 1985. However, as discussed above, plaintiff clearly has failed to allege a cause of action under 1985. As a result, this court may not assert jurisdiction under section 1986 and therefore recommends that plaintiff's section 1986 claim be dismissed. See Fed. R. Civ. P. 12(h)(3).

Thus only plaintiff's section 1983 claim remains. This is the claim defendants address in their motions to dismiss and for summary judgement. The court next examines motions.

B. Section 1983 Claim

The Provo City defendants motion for summary judgement The Provo City defendants have filed a motion for summary judgement. See file entries # 84, 85. These defendants argue that plaintiff's section 1983 claim against them is barred by the statute of limitations and, alternatively, that it fails to state a claim against these defendants. Summary judgement is proper " if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law ". Fed. R. Civ.P. 55 (C). The court must construe all facts and reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. See *Matsushita Elec. Indust. Co v. Zenith Radio Corp*_475 US 574, 587, 106 S. Ct 1348, 1356 (1986).

The United States Supreme court has ruled that the applicable statute of limitations under section 1983 is that for personal injury cases under the law of the states where the section 1983 action is brought. See *Wilson v Garcia* 471 US 261, 275-76, 105 S. Ct. 1938, 1946-47 (1985). In Utah, that period is four years. See Utah Code Annotated 78-12-25(3) (2002); *Sheets v Salt Lake County*, 45 F 3d. 1383, 1387 (10th Cir.) cert. Denied, 516 US 817, 116 S Ct. 74 (1995).

The investigations against plaintiff occurred in 1995. The case officer submitted the final report on the case to the Utah County Attorney on October 17, 1995. The case was ont criminally prosecuted. See file entre # 85, exhibit 1. Provo City, Officers Billings and Jensen, and Sergeant Harper all had not further involvement in the case after submitting their report on October 17, 1995; other than receiving the memorandum from the Utah County Attorney office on January 27, 1997. See if. However, even taking the date of January 27, 1997, as when plaintiff's cause of action began to accrue, plaintiff's claim is barred by the statute of limitations. Plaintiff filed his original complaint, which was later dismissed, on April 19, 2001, and his amended complaint on December 7, 2001. See file entries # 1, 77. Therefore, this cause of action was commenced after four years had passed from the time the action began to accrue and is therefore barred by the statute of limitations.

At oral arguments, plaintiff argued he did not know informants wearing wires were used in

his office until January 11, 2001, and therefore the time for filing his case should not have begun to accrue until that date. However, the time period for purposes of the statute of limitations begins to run " when the plaintiff knows or has reason to know of the injury which is the basis of his action ". See *Hunt v Bennett* 17 F 3d. 1263, 1266 (10th Cir.) (citation omitted), cert. denied, 513 US 832, 115 S Ct. 107 (1994). Plaintiff himself signed the stipulation giving up his license to prescribe controlled substances in June 1996. Plaintiff again signed the DEA form 104 in August 1996. Plaintiff thus knew of the alleged injury against him, by June 1996 and certainly by August 1996. Therefore, this court rejects plaintiffs argument that he was unable to discover the basis of his complaint in time to file within the four years required time period. As a result, summary judgement should be granted in favor of defendants Provo City, Billings, Jensen and Harper.

2. The Couty Defendants Motion for Summary Judgement

The county defendants have filed a motion for summary judgement. See file entries # 92, 93. The county defendants also argue that plaintiff's claim against them is barred by the statute of limitations. Alternatively, the county defendants argue that they are entitled to qualified immunity; that the county is not liable because plaintiff has not alleged or demonstrated that the county officials acted pursuant to any county policy, practice, or custom; that plaintiff's claim of cruel and

unusual punishment fails because such claims only apply to incarcerated persons; that they are protected by absolute immunity from plaintiff's claim of failure to indict him, if that is a claim; and that there was no underlying civil rights violation to support plaintiffs claim. The court does not reach these alternative arguments because it concludes that plaintiff's action against the county defendants is barred by the applicable statute of limitations.

Plaintiff's main complaint with respect to the county defendants is that their wired informant gathered information which eventually led to the surrender of his controlled substance license to prescribe drugs, which surrender now prohibits his ability to practice medicine. Plaintiff also argues that other actions on the part of the county defendants violated his civil rights, leading up to the surrender of his license. Thus, the conduct plaintiff complains of relating to the county defendants occurred prior to plaintiff surrendering his license.

As discussed above in section 1, this action is subject to a four year statute of limitations. Plaintiff voluntarily surrendered his controlled substance license on June 11, 1996. The order was entered on plaintiff's voluntary surrender on June 18, 1996. However, as discussed above, plaintiff did not file his original complaint in this action until April 30, 2001, and he did not file his amended complaint until December 7, 2001. Therefore, plaintiff filed his action after the four year statute of limitations had run; therefore, his section 1983 claim against the county defendants is barred.

3. Utah County Attorney's office's motion to dismiss. Defendant Utah County Attorney's office has filed a motion to dismiss plaintiff's claim against it. See file entries # 86, 87. The Utah County Attorney's office argue that it is not a legal entity which can sue or be sued, but is merely an arm, department, or division of Utah County, a political subdivision.

Federal rules of civil procedure 17(b) directs that in cases other than that of an individual, corporation, partnership, or receiver appointed by a court, the " capacity to sue or be sued shall be determined by the law of the state in which the district court is held ". See Utah Code Ann. 17-50-302(2)(a) (2001). However, no similar statute exists establishing that a division or department of a county, such as the Utah County Attorney's office, has the power to sue or be sued.

Furthermore, this court is not unique in concluding that a department or division of a public entity is not proper party in a civil rights case because it is only a part of a larger government entity. See *Martinez v Winner* 77 F 2d 424, 444 (10 Cir.1985). (in civil rights action, dismissing complaint as to " City of Denver Police Department " because it is not a separate suitable entity); see also,*Dean v Barber* 951 F 2d 1210, 1214 (11th Cir1992) (holding county sheriff's department not a legal entity subject to suit); *Vance v County of Santa Clara* 928 F Supp 993, 996 (ND Cal 1996); (holding that county department of corrections was not proper defendant under section 1983 because it was a county agency); *Stump v Gates*

777 F Supp 808, 816 (D Colo 1991) (holding cities police department and county coroner's office not separate legal entities of city and county, but departments of city and county and were not proper defendants under section 1983); *Fields v Department of Corr*,_7809 F Supp 20, 21, 22 (D DC 1992) (holding district of Columbia's department of corrections was an agency or department within district of Columbia, and therefore was not separate suitable entity); *Post v City of Ft. Lauderdale* 750 F Supp 1131, 1133 (N D Ga 1990) (holding city police department and building and zoning department lacked legal identities apart from city and therefore were not suable entities in section 1983 action). As a result, defendants-Utah County Attorney's office is not a proper defendant in this case and the claims brought against it should be dismissed.

4. The Utah State Defendants's Motion to Dismiss and for Summary Judgement

A motion to dismiss and for summary judgement has been submitted by the Utah State defendants. See file entries # 89, 90. The Utah state defendants argue that the claim against the agencies of the State of Utah, the Department of Commerce, the Attorney General's office, the DOPL, and the individually named state defendants in their official capacitites are barred by law and should therefore be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

The Utah state defendants ask for summary judgement, pursuant to Federal Rule of Civil

Procedure 56, with regard to plaintiff's claims for damages against any of the Utah State defendants individually named and brought against them in their individually capacities. These defendants argue that they are protected by qualified immunity because plaintiff has not shown that the defendants violated plaintiff's constitutional or statutory rights.

The court, however, is aware that plaintiff;s claims against Utah state defendants are barred by the four year statue of limitations, as analyzed in the above sections. However, the Utah state defendants failed to raise the statute of limitations until oral arguments and the Tenth Circuit has not clearly held that courts can sua sponte raise the statute of limitations, although it has made that suggestion in a unpublished opinion. See *United States v Verners* 2001 WL 811719, at *2 (10th Cir 2001)(unpublished) (" we conclude that the question of equitable tolling is ripe for adjudication only when a section 2255 motion has actually been filed and the statute of limitations has been raised by the respondant or the court sua sponte "). Therefore. This court addresses the defenses raised by the Utah state defendants. The court first examines the motion to dismiss.

a. Motion to Dismiss

In considering a rule 12(b)(6) motion, the complaint must be construed liberally. See *Scheurer v Rhodes* 416 US 232, 236, 94 S Ct. 1683, 1686, (1974) and its factual allegations must be assumed to be true, see *Williams v*

Neitzke 490 US 319, 326-27, 109 S Ct. 1827, 1832 (1989). Dismissal of a claim is improper unless it appears beyond doubt that the pliantiff's cannot prove a set of facts that would entitle them to relief. See *Conley v Gibson*_355 US 41, 47-48, 78 S Ct. 99, 102 (1957).

The United State Supreme Court has held that suits for damages brought against a state or its agencies are not proper under 42 USC section 1983 because states are not persons within the meaning of that statute. See *Quern v Jordan* 440 US 332, 340-41, 99 S Ct. 1139, 1145 (1979); *Will v Department of State Police*_491 US 58, 64, 109 S Ct 2304, 2308 (1989).

Therefore, plaintiff has no federal cause of action for damages against the State of Utah and its agencies. As a result, the State of Utah department of commerce, the Utah state attorney general's office, and the DOPL are not proper defendants in plaintiff's section 1983 action. Those claims against the State of Utah and its agencies are therefore dismissed.

Furthermore, any cause of action plaintiff has brought against the individually named state defendants in their official capacity is also improper. A federal cause of action for damages against state employee acting in his or her official capacity is deemed to be a cause of action against the state and its agency. See *Kentucky v Graham*_473 US 159, 165-66, 105 S Ct. 3099, 3105 (1985). Therefore, as explained above, because states and their agencies are nc' " persons " who can sue or be sued under 42 USC section 1983, it is recommended that

those claims directed at the individually named state defendants, brought against them acting in their official capacity, also be dismissed from this action.

b. Summary Judgement Motion

Second, the Utah state defendants argue that the individually named Utah state defendants are protected by qualified immunity from plaintiff's claims directed at them acting in their individual capacities. The Utah state defendants ask that the court grant summary judgement in their behalf as to any such claims. Summary judgement is proper " if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law". Fed. R. Civ. P. 56(c)." After a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff ". *Medina v Cram*_252 F 3d. 1124, 1128 (10th Cir 2001). Plaintiff must meet a heavy two-part burden. See id. First, plaintiff must show that the defendants actions violated a constitutional or statutory right. See id. Second, if plaintiff establishes a constitutional or statutory violation, plaintiff must show that the right violated was clearly established at the time of the facts at issue. See id; *Mick v Brewer* 76 F 3d 1127, 1134 (10 Cir 1996). Thus, the court first examines whether plaintiff has established that the Utah state defendants actions violated a constitutional or statutory right.

First, plaintiff alleges that the NET investigators used an illegal body wire on an informant to gather evidence against him and that they provided the DOPL investigators with the illegally obtained evidence. However, case law is clear that the Fourth amendment is not violated when one's own conversation with government informant is secretly recorded with the consent of the informant, even though the other party does not know that conversation is being recorded. See *United States v White* 401 US 745, 751, 91 S Ct 1122, 1125-25 (1971); *Lopez v United States 373* US 427, 439, 83 S Ct 1381, 1388, (1963); *United States v Longoria* 177 F 3d 1179, 1182-83 (10 Cir 1999), cert. denied, 528 US 892, 120 S Ct 217 (1999). " What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth amendment protection ". *Katz v United States* 389 US 347, 351, 88 S Ct 507, 511 (1967).

Second, plaintiff alleges that the individually named Utah state defendants violated his due process rights by preparing and presenting the stipulation and order providing for the voluntary surrender of his controlled substance license. Plaintiff further claims that he signed the stipulation and order under duress and without informed consent.

However, the stipulation and order plaintiff signed provides that " respondant [plaintiff] acknowledges that he enters into this stipulation voluntarily, and other than what is contained in this agreement, no promise or

threat whatsoever has been made by the attorney general, division, or any member, officer, agent or representative of division
Or the attorney general's office to induce him to enter into this agreement ". File entry # 90, exhibit 2. Thus, plaintiff unambiguously acknowledged in writing that he made the agreement voluntarily, and he has not presented information showing otherwise. The stipulation and order further declares that " respondant acknowledges that he has been informed of his rights to represented by counsel, and has not chosen to be represented by counsel ". Id. The document also provides:

Respondant understands that he is entitled to a hearing before the Utah state physician's licensing board ("the board ") at which time he may present to the board evidence on his behalf, present his own witnesses and confront adverse witnesses. Respondant herby acknowledges that by executing this document, he waives" (1) notice to agency action and petition. (2) the right to a hearing before the board. (3) the right to present evidence on his own behalf. (4) the right to present his own witnesses, and (5) the right to confront adverse witnesses, together with such other rights as to which he may be entitled in connection with said hearing. Id. Thus, in the stipulation and order he voluntarily signed, plaintiff also acknowledged the due process rights he was giving up in signing the stipulation and order.

Plaintiff relies on *Zinemon v Burch*_494 US 113, 110 S Ct 975 (1990), for support of his due process claim. However, in that case, the

plaintiff signed forms in apparent compliance with voluntary commitment statutes while he was medicated and disoriented. No such facts substantiating claims of involuntariness have been alleged in this case. To the contrary, plaintiff has been well educated and certainly should have been able to understand the clear language of the form he signed. Furthermore, Dr. Washburn remains a practicing psychiatrist And should thus be mentally competent to understand the language of the form and the clearly enumerated consequences of signing it.

Plaintiff was informed of his due process rights After the fact and voluntarily chose to waive them. Merely having a subsequent change of mind does not result in a violation of his rights. Therefore, plaintiff has not established that the individually named Utah state defendants violated plaintiff's due process rights by preparing and presenting the stipulation and order providing for the voluntary surrender of plaintiff's controlled substance license.

Third, plaintiff claims that the individual Utah state defendants violated his fifth amendment right against self-incrimination by preparing and presenting the stipulation and order. However, the fifth amendment only protects people from self-incrimination in criminal case. See *Austin v United States*_509 US 602, 607-608, 113 S Ct 2801, 2804 (1993); it does not give protection in administrative proceedings, such as that in which plaintiff signed the stipulation and order.

Furthermore, plaintiff did not make any

admissions in the stipulation and order. The document merely provides that " respondant [plaintiff] recognizes the division (DOPL) has commenced an investigation into issues relating to respondant's prescribing of controlled substances. To avoid the potential for being subjected to the investigation and disciplinary process, respondant surrenders his controlled substance license ". File entry # 90, exhibit 2. Thus, because plaintiff does not admit to wrongdoing in the document, the fifth amendment does not apply to this situation.
As a result, plalintiff has not shown that the Utah state defendants violated plaintiff's fifth amendment rights by preparing and presenting the stipulation and order for plaintiff's signature.

Fourth, plaintiff claims the Utah state defendants violated his seventh amendment right. However, plaintiff is foreclosed from raised a seventh amendment argument. The United States Supreme court has explained the " the seventh amendment is generally inapplicable in administrative proceedings where jury trials would be incompatable with the whole concept of administrative adjudication and would substantially interfere with the agency's role in the statutory scheme". *Loether v Curtis* 415 US 189, 194, 94 S Ct 1005, 1008 (1974).

It is possible that instead of making a seventh amendment argument, plaintiff meant to make an eigth amendment argument because, in stating his claim, he mentions excessive fines in parentheses after his seventh amendment

claim. The eighth amendment provides, "excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted " US Constitutional amendment 8. The eighth amendment's prohibition of excessive fines " limits the government's power to extract payments, whether in cash or in kind, as " punishment for some offense " *United States v Bajakajian* 524 US 321, 328, 118 S Ct 2028, 2033, (1998).

The Utah state defendants argue that the excessive fines provision of the eighth amendment does not apply because revocation of a license is not done to punish a licensee for his conduct, but is done because the conduct indicates that the licensee is not longer qualified to hold the license. The United States Supreme court has explained that in determining whether and act is a "punishment" The question is " whether the legistlative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as relevant incident to a regulation of a present situation, such as the proper qualifications for a profession ". *De Veau v Braisted* 363 US 144, 160, 80 S Ct 1146, 1155 (1960). The state of Utah has legitimate interest in regulating controlled substances and providing regulations regarding who may receive a controlled substance license. Utah law provides that controlled substance license may be suspended upon finding that the licensee has " violated any department rule that reflects adversely on the licensee's reliability and intergrity with respect to controlled substances". Utah code annotated 58-37-

6(4)(a)(vi) (2002. The statute is a regulatory, public welfare measure, not a measure to punish past behavior.

Of course in this case the state did not revoke plaintiff's license. Rather, plaintiff voluntarily surrendered his license. Even so, such a surrender was consistant with Utah regulatory law and therefore was not unwarranted in law or disproportionante to the gravity of plaintiff's alledged behavior in overprescribing controlled substances. See *Butz v Glover livestock Comm.,n Co.*_411 US 182, 185-86, 93 S Ct, 1455, 1458 (1973). Therefore, the voluntary surrender of plaintiff's controlled substance license was not a punishment. As a result, plaintiff has not shown that the Utah state defendants violated his eighth amendment rights in this action.

Plaintiff has not successfully alleged that the Utah state defendants violated his constitutional rights. As a result, the individual Utah state defendants are entitled to qualified immunity. Therefore, this court recommends that their motion for summary judgement be granted as to the claims brought against them in their individual capacities.

C. Bivens Claim

Plaintiff's complaint also seeks damages from various federal defendants for alleged constitutional violations. Because plaintiff may not bring a section1983 actoin against federal defendants, this court has construed these claims to be Bivens claims,

see *Bivens v Six unknown named defendants of the federal bureau of Narcotics* 403 US 388 (1971). And the court analyzes them as such. First, the court addresses the DOJ and DEA motion to dismiss.

1.DOJ and DEA Motion to Dismiss

The DOJ and DEA argue in their motion to dismiss, see file entries # 82, 83, that plaintiff's claims against them should be dismissed under federal rule of civil procedure 12 (b)(1) for lack of subject matter jurisdiction because they are entitled to sovereign immunity in this case. Defendants DOJ and DEA alternatively argue that plaintiff's amended complaint as against them should be dismissed for failure to properly serve the DOJ and DEA because plaintiff has not served the attorney general as required by federal rule of civil procedure 4(i)(1)(A) and (B). This court agrees with the DOJ and DEA's first argument and therefore does not reach their second argument.

Under Bivens, plaintiff in certain circumstances are allowed to sue federal employees in their individual capacities for alleged constitutional violations. However, Bivens does not allow lawsuits against the federal government, a federal agency, or federal employee in his or her official capacity. See *Bivens*, 403 US at 410; *FDIC v Meyer* 510 US 471. 486 (1994). As a result, plaintiff's amended complaint against defendnatns DOJ and DEA must be dismissed because, as federal agencies, they are entitled to sovereign immunity on the claims plaintiff has brought against them.

2. DEA Individual Defendants Motion to Dismiss

The DEA individual defendants have filed a motion to dismiss plaintiff's amended complaint against them. See file entries # 95, 96. The DEA individual defendants argue plaintiff's claim against them is barred by the statute of limitations. Alternatively, these defendants argue that they are entitled to qualified immunity and that plaintiff has failed to serve them within the required time. The court does not reach these alternative arguments because it concludes that plaintiff's action is barred by the statute of limitations.

A four year statute of limitations applies to Bivens actions arising in Utah. See Utah Code Ann. 78-12-25 (3) (2002). *Industrial Contractors Co. v United States Dept of Reclaimation*, 15 F 3d 963 (10th Circuit 1994) (providing that the general personal injury statute of limitations in the state where the action arises is applicable to Bivens action).

The claim plaintiff makes in his amended complaint against DEA individual defendants is that they violated his right to procedural due process when they terminated his authority to prescribe controlled substances without notice, a hearing, or a trial. The DEA received the completed DEA form 104 on September 18, 1996 and Agent Meadows approved the surrender of registration on approximately September 23, 1996. see file entry # 96 exhibit A. However, plaintiff did not file his original

complaint until April 30, 2001 and plaintiff did not file his amended complaint until December 7, 2001. see file entries # 1, 77. As such, plaintiff's action *against the DEA individual* defendants is barred by the applicable four year statute of limitations.

RECOMMENDATION

Based on the above analysis, the following are recommended:

1. that the court dismiss plaintiff's section 1985(3) claims for lack of jurisdiction.
2. that the court grant the Provo city defendants motions for summary judgement because plaintiff's section 1983 claims against them are barred by the statute of limitations
3. that the court grant the Utah county attorney office motion to dismiss because it is not a proper defendant in this case
4. that the court grant the Utah state defendants not to dismiss and for summary judgement because the state, its agencies, and individually named state defendants acting in their official capacities are improper defendants in section 1983 actions and because the individually named state defendants acting in their individual capacities are protected by qualified immunity
5. that the court grant DOJ and DEA motion to dismiss because federal agencies are improper defendants in Bivens actions; and

6. that the court grant DEA individual defendants motion to dismiss because plaintiff's Bivens claim is barred by the statute of limitations.

Because, after dismissing the above claims and defendants, the only listed defendants in this action are Allred and Bancroft, who have not been served and are therefore not parties to this action, this court also recommends that the plaintiff's action be dismissed.

Copies of the foregoing report and recommendation are being mailed to the parties who hereby notified of their right to object to the same. The parties are further notified that they must file any objections to the report and recommendation with the clerk of the court pursuant to 28 USC section 636(b) within 10 days after receiving it. Failure to file objections may constitute waiver of those objections on subsequent appellate review.

Dated this 5th day of February, 2003

/s/ Samuel Alba

Samuel Alba
United States Chief Magistrate Judge

APPENDIX B

OPINION OF DISTRICT COURT JUDGE
Judge Paul G. Cassell
Entered March 3, 2003

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Philip Washburn
Plaintiff

Order Amending Previously Entered Order and Adopting Report and Recommendation

Vs.

United States Department of Justice, et al.
Defendants

This order amends the previously entered oder adopting report and recommendation entered on February 24, 2003 as docket no. 101. This matter is before the court for consideration of the magistrate judge report and recommendation issued February 5, 2003. Washburn filed his objections to the report and recommendation on February 23, 2003. Although this is technically well beyond the ten day limit of time for Washburn to serve and file written objections, the court has nevertheless reviewed his objections, the report and recommendation, and the relevant law. After conducting De Novo review of those portions

of the report and recommendation that Washburn objected to, the court hereby finds that the magistrate's analysis of the facts and the law in this case is sound and without fault or error. Accordingly, chief judge Alba's report and recommendation of February 5, 2003 is hereby adopted in its entirety, specifically,

1. the court dismisses plaintiffs section 1985(3) 1986 claims for lack of jurisdiction
2. the court grants summary judgement in favor of the Provo city defendants because plaintiffs section 1983 claims against them are barred by the statute of limitations.
3. the court grants the Utah county attorney motion to dismiss because it is not a proper defendant in this case.
4. the court dismisses the claims against NET because it is not a suitable entity
5. the court grants the Utah state defendants motion to dismiss and for summary judgement because the state, its agencies, and individually named state defendants acting in their official capacities are improper defendants in section 1983 actions and because the individually named state defendants acting in their individual capacities are protected by qualified immunity.
6. the court grants the DOJ and DEA motion to dismiss because federal agencies are improper defendants in Bivens actions and
7. the court grants DEA individual defendants motion to dismiss because plaintiff's Bivens claim is barred by the

8. statute of limitations

Therefore, having dismissed the above claims and defendants, the only listed defendants in this action are Allred and Bancroft, who have not been served and are therefore not parties to this action. Accordingly, the court dismisses this action with prejudice, in its entirety, with all parties to bear their own fees and costs.

SO ORDERED
Dated this 3rd day of March, 2003
BY THE COURT:

/s/ Paul G. Cassell

Paul G. Cassell
United States District Court Judge

APPENDIX C

OPINION OF 10TH CIRCUIT COURT OF APPEALS

United States Court for the Tenth Circuit

Philip Washburn
Plaintiff-Appelant

Vs.

United States Department
Of Justice, et.al.
Defendants-appellees

Filed
February 10, 2004
Patrick Fisher
Clerk

No. 03-4058
(D.C. No. 2:01-CV-268-PGC)
(D.Utah)

ORDER AND JUDGEMENT

Before EBEL, HENRY, and MURPHY, Circuit Judges.

After examining the briefs and appellant record, this panel has determined unanimously that oral arguments would not materially assist the determination of this appeal. See Fed R.App. P. 34(a)(2) 10th Circuit R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Philip Washburn MD, proceeding pro se appeals from an order of the district court

dismissing some of his claims against various defendants and granting summary judgement to defendants on the remaining claims. We Affirm.

Dr. Washburn was investigated by the state licensing board as well as the state narcotics taskforce regarding his prescription practices. The investigations revealed that he had been overprescribing controlled substances and was not following proper medical guidelines. As a result, Dr. Washburn signed a stipulation in which he voluntarily surrendered his controlled substance license and agreed that he would not reapply for another one. In the process, Dr. Washburn stated that he was signing the stipulation valountarily and that the stipulation, once approved, would be the final settlement of the matter.

Upon receipt of that agreement, the federal DEA informed Dr. Washburn that his DEA certificate of registration was subject to revocation. Dr. Washburn agreed to voluntarily surrender his registration. Later, Utah county attorney office decided not to criminally prosecute Dr. Washburn.

Approximately three years later, Dr. Washburn filed this action in federal court under fourth, Fifth, Seventh, and Fourteenth amendment had been violated. He alleged defendants had made false and defamatory statements about him, permitted unpriviledged publication to third parties, harmed his reputation in the community and exposed him to contempt and ridicule. Dr. Washburn alleged he had lost his ability to earn

a living. He sought over 90 million dollars in damages and reinstatement of his controlled substance license as well as a public explaination and apology.

Adopting the magistrate judges report and recommendation, the district court dismissed Dr. Washburn's claims (1) under 42 USC section 1985(3) and 1986 for lack of jurisdiction. (2) against the Utah county narcotic enforcement taskforce and the county attorneys as not proper defendants before the court (3) against the Department of Justice and the DEA as improper defendants in Bivens actions and (4) against the DEA individual defendants as barred by statute of limitations. The court granted summary judgement in favor of (1) Provo city and Utah county defendants as those claims were barred by statute of limitations (2) the Utah state defendants, its agencies, and the individual state defendants in their official capacities were improper defendants in a 42 USC section 1983 actoin and (3) the state defendants in the individual capacities as protected by qualified immunity. The court noted that the remaining defendants had not been served and were not parties to the action.

On appeal, Dr. Washburn argues that the magistrate judge did not have authority to rule on dispositive motions as he did not agree to have the magistrate judge manage his case. He contends that only a jury can determine whether constitutional violations occurred and whether the defense of immunity applies. He contests the district court orders dismissing

some of his claims for lack of jurisdiction, noting for the first time that he is commanche Indian. Dr Washburn argues that the district court erred in granting the county's motion to dismiss because the county can sue and be sued. He contends that he did not file this case as a Bivens action, but as a breach of contract action and therefore, it was timely filed. Dr. Washburn argues that evidence was illegally seized to be used against him in a criminal prosecution, thus violating his right against self-incirmination.

We review the district court's ruling as to defendants motion to dismiss De Novo. Steele v United States 19 F3d. 531, 532 (10 Cir 1994). We review a grant of summary judgement De Novo and apply the same legal standard used by the district court under Fed. R. Civ. P. 56 (C). Timmons v White 314 F3d. 1229, 1232 (10 Cir 2003). Our review is limited to those issues to shich Dr. Washburn objected in his response to the magistrate judge's report and recommendation. See Powell v Ray 301 F3d. 1200, 1202 n.3 (10Cir2002) cert. denied 538 US 927 (2003).

Upon review of the record and the parties briefs, we AFFIRM the judgement of the district court for substantially the same reasons stated in the magistrate judge's report and recommendation of February 5, 2003, as adopted by the district court in its orders of February 24, 2003 and March 3, 2003. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Michael R Murphy
Circuit Judge

FOOTNOTES

This order and judgement is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgements, nevertheless, an order and judgement may be cited under the term and conditions of the 10th Cir. R. 36.3

APPENDIX D

Division of Occupatational and Professional Licensing Stipulation and Order 96-160

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING OF THE DEPARTMENT OF COMMERCE OF THE STATE OF UTAH

In the matter of the license of Phillip Washburn, M.D. to practice medicine and to administer and prescribe controlled substances in the State of Utah	Stipulation and Order 96-160

Philip Washburn MD (respondant) and the Division of Occupational and Professional licensing of the Department of Commerce (division) stipulate and agree as follows:

1. respondant admits the jurisdiction of division over him and over the subject matter of this action.
2. respondant acknowledges that he enters into this stipulation voluntarily and other than what is contained in this agreement, no promise or threat whatsoever has been made by the attorney general, division or any member, officer, agent or representative of division or the attorney general office to induce him to enter into this agreement.
3. respondant acknowledges that he has

been informed of his rights to be

represented by counsel and has chosen not to be represented by consel

4. respondant understands that he is entitled to a hearing before the Utah state physicians licensing board (the board) at which time he may present to the board evidence on his behalf present his own witnesses and confront adverse witnesses. Respondant hereby acknowledges that by executing this document, he waives (1) notice of agency action and petition (2) the right to a hearing before the board (3) the right to present evidence on his behalf (4) the right to present his own witnesses and (5) the right to confront adverse witnesses, together with such other rights as to which he may be entitled in connection with said hearing. respondant acknowledges that this

stipulation and order if adopted by the director of the division will be classified as a public document and may be released to the public upon request. In addition, division is authorized to inform other state and federal agencies fot he action taken herein and of the content of this stipulation and order respondant recognizes the division has commenced and investigation into issues relating to respondants prescribing of controlled substances. To avoid the potential for being subjected to the investigation and disciplinary process, respondant surrenders his controlled substance license.

Respondant acknowledges this stipulation and order upon approval by the director of division shall be the final conpromise and settlement of this matter. Respondant further acknowledges the director of division is not required to accept the terms of this stipulation and order and if the stipulation is not accepted by the director, it is null and void and without any force or effect whatsoever.

This document constitutes the entire agreement between the parties and supercedes and cancels any and all prior negotiationa, representations, understandings or agreements between the parties. There are no verbal agreements which modify, interpret, contrue or affect this stipulation.

DIVISION OF OCCUPATIONAL
AND PROFESSIONAL LICENSING

Date: 6/11/1996

/s/ R. Paul Allred

Assistant Attorney General

RESPONDANT

Date: 6/11/1996

/s/ Philip Washburn M.D

Philip Washburn, M.D.

ORDER

The stipulation above, which is approved by the division of occupational and professional licensing, constitutes my findings of fact and conclusions of law in this matter. The terms and conditions of the stipulation are incorporated herein and constitute my final order in this case.

Dated this 18 day of June, 1996

/s/ J. Craig Jackson

J. Craig Jackson, Director
Division of Occupational and
Professional licensing

APPENDIX E

Utah Administrative Law Judge
Masuda Medcalf
Utah Department of Commerce Order
Entered May 15, 2002

Before the Department of Commerce
of the State of Utah

In the matter of the request for agency review
Of: Philip Washburn, M.D>
Petitioner

Finding of Fact and Conclusions of Law
and Recommended Order
DOPL
May 15, 2002

Introduction

This matter came before the Department of Commerce on request for agency review filed by Philip Washburn (petitioner) following the denial of his application for a licensen to administrer and prescribe controlled substances by the Division of Occupational and Professional licensing.

Statutes or Rules Permitting Review

Agency review of the Divisions decision is conducted pursuant to Utah Code Ann section 63-46b-12 and Utah Administrative law R151-46b-12

Issues Reviewed

Whether the division properly denied petioner's application for a licensen to administer and prescribe controlled substances in the State of Utah.

Finding of Fact

On October 25, 2001 Petitioner submitted an application to the Division seeking a controlled substance license. By letter dated November 5, 2001, the division notified the petitioner that his application was denied on the grounds that he had voluntarily surrendered his license in 1996 and agreed not to reapply. On November 30, 2001, petitioner filed a timely request for agency review of the divisions decision. Petitioner perfected his request on December 12, 2001, when he provided a copy of the divisions denial letter to the department.

2. In his request for agency review from the divisions denial, petitioner states various grounds for review, including the following arguments;

a. The divisions decision was based upon a determination of fact made or implies by the agency that is not supported by substantial evidence when reviewed in light of the whole record. Utah Code Ann. 63-46b-16(4)(g). Petitioner states " I was coerced into self-incrimination

b. by signing the order 96-160 without knowledge of the evidence and investigations that had taken place by DEA officers and the division in the summer of 1995 ".

c. Petitioner had a right to notice of the criminal charges and the right to a hearing under Utah Code Ann. 58-12-35.1, 63-46b-8(I)(d) thru (f) and 63-46b-20(a). Petitioner states, " Counsel was not made available to me at any point in this criminal action...I was coerced into self-incrimination by signing the 96-160 order under threats by division agents that I would lose my medical license and go to jail..." and

d. Petitioner is entitled to a license under Utah Code Ann. 58-1-11(1)(3) because he passed the Utah controlled substance general law review, paid his fees to the division and he meets all the qualification requirements for a license.

Petitioner submitted various documents with his request for agency review, including a copy of the 1996 stipulation and order, incident reports from the Utah county narcotic taskforce and various law enforcement agencies, the Utah county attorney screening sheet, and prior correspondance with the division.

The division's response memorandum raises several arguments in opposition to the petitioner's request for agency review. Those arguments include the following:

i. petitioner's request for relief from

the stipulation and order was raised for the first time on agency review and was not part of the divisions proceedings

ii. petitioner's request for relief from the stipulation and order is untimely and beyond the scope of the departments review and

iii. the stipulation and order is a binding contractural agreement between the division and petitioner. Therefore the division did not abuse its discretion by relying upon that document and denying petitioner's application on that basis.

iv. Petitioner has filed no memorandum

v. The stipulation and order was issued June 18, 1996.A review of that document indicates that the division began investigating complaints filed against petitioner regarding his prescribing of controlled substances, and that petitioner surrendered his controlled substance license and entered into the stipulation to avoid the investigtaton and disciplinary process. In addition, petitioner agreed not to reapply for a controlled substance license in the future.

Conclusions of Law

Where petitioner challenges a finding of fact in the order subject to review. Petitioner must demonstrate, based on the entire record that the finding in not supported by substantial

evidence. Utah Admin. Code R151-46b-12 (3) (c). Under section R151-46b-12(7) the standards for agency review within the Department of Commerce correspond to those established by Utah Code Ann. 63-46b-14 (4) which provides in pertinent part:

The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejusticed by any of the following:

(g) the agency action based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court...

Therefore pursuant to 63-46b-16 (4)(g), the executive director is required to review the whole record and the facts both supporting and detracting from the findings to determine whether the action is supported by substantial evidence. In his request for agency review, petitioner states that he challenges the divisions findings as unsupported by substantial evidence pursuant to 63-46b-16 (4). However, petitioner voluntarily surrendered his controlled substance license in 1996 and agreed not to reapply. In fact, petitioner admits that he entered into such a stipulation. Petitioner's true concern appears to be the validity of that stipulation and order. Petitier states for example, that he was coerced into signing the stipulation, and that he was ot provided all appropriate and required procedural safeguards

in conjunction with the criminal charges. However, as the division has correctly pointed out, the validity of the 1996 stipulation and order is not properly before the department.

Under 63-46b-16 (4) the department's review is limited to a review of the " agency's record ". There is no indication in this matter that petitioner raised concerns regarding the validity of the stipulation, or that he requested division to set aside the stipulation and order. Along with his application for a controlled substance license, petitioner submitted a letter dated October 25, 2000 to the division. The letter stated that petitioner was applying for his license, and that he believed he met all the requirements for licensure. Petitioner's letter further stated, If my license to prescribe controlled substances is denied by your division, I will file civil charges in the courts of the State of Utah. However, petitioner did not take to opportunity to request the division to set aside or modify the prior stipulation and order, nor did petitioner include in his application copies of all documents he now attaches to his request for agency review.

As a result of petitioner's failure to raise concerns regarding the stipulation and order at the time of his application, the division's record is bereft of any findings or conclusions on that issue. Furthermore, absent extraordinary circumstances or plain error, issues cannot be raised for the first time on appeal. US Xpress v Utah State Tax Comm. 885 P 2d. 1115, 1119 (Utah Court Appeals 1994). The executive director is now unable to consider petitioner's

new arguments and new documentation. Therefore, the division's findings that petitioner entered into a stipulation and agreed not to reapply for a controlled substance license remains unchallenged, and is supported by substantial evidence.

The division's memorandum summarizes the controlling case law regarding stipulations executed between the division and any professionals regulated by the division (ie that stipulations are contractural agreements and are enforceable and binding upon the parties). Based upon such legal authority, the division was entitled to rely upon the stipulation and order in denying petitioner's most recent application for a controlled substance license. The division was further entitled to rely upon the stipulation and order under authority of Utah Code Ann. 58-1-306 which provides in pertinent part:

(1) the division may, by written agreement, accept thevoluntary surrender of a license.

(4) unless otherwise stated in the written agreement, the surrendered rights and priviledges of licensure may be reacquired only by reapplying for licensure and meeting the requirements for a new or reinstated license set forth under this title or in rules adopted under this title.

The stipulation and order in this matter otherwise stated that petitioner would not reapply for a controlled substance license. Therefore, under 58-1-305 (5) petitioner could

not reapply for a license as long as the stipulation and order remains in place.

Recommended Order

For the foregoing reasons, the division of Occupational and Professional licensing's denial of Philip Washburn MD application for a license to administer and prescribe controlled substances should be affirmed.

Dated this 15th day of May, 2002

/s/ Masuda Medcalf

Masuda Medcalf
Administrative Law Judge

APPENDIX F

Department of Justice Opinion
Administrative Law Judge Gail A. Randall
Docket File 02-17
Entered April 25, 2002

United States Department of Justice
Drug Enforcement Agency

In the matter of:

Docket File No. 02-17

Philip Washburn, M.D.

Ruling, Opinion and recommendation decision of the Administrative Law Judge

Gail A. Randall, Administrative Law Judge

Appearances:

Brian Bayly, Esq
Counsel for Government

Philip Washburn M.D>
Pro Se

Dated April 25, 2002

Factual Background

On or about November 8, 2001, the deputy assistant administrator, office of diversion control, drug enforcement administration (DEA) issued an order to show cause to Philip

BEST AVAILABLE COPY

Washburn M.D. (respondant) affording the respondant an opportunity to show cause as to why the DEA should not deny his pending application, received at DEA on August 3, 2001, for a DEA certificate of registration as a practioner. By letter dated December 8, 2001, the respondant requested a hearing to resolve this matter. On January 31, 2002, the government filed a motion for summary disposition, and if necessary, to stay the proceedings while the government's motion for summary judgement is pending (motion) in the above captioned matter. Therein, the government alleged that the respondant lacks state authority to handle controlled substances in the stat of Utah, and thus the DEA must deny his pending application for a DEA certificate of registration.

Discussion

Under the controlled substances act, the DEA does not have the authority to issue a registration when the applicant is without state authority to handle controlled substances. See 21 USC section 823 (f) (2001) (authorizing the attorney general to register a practioner to dispense controlled substances only if the applicant is authorized to dispense controlled substances under the laws of the state in which he or she practices). 21 USC section 802 (21) (2001) (defining a practioner as one authorized by the United States or the state in which he or she practices to handle controlled substances in the course of professional practice or research). See Michael Pines DDS 64 Fed Reg 33,318 (DEA 1999). According to the governments

motion, the respondant and the Division of Ocupational and Professional licensing, Department of Commerce, State of Utah entered into a stipulation and order effective June 18, 1996, in which respondant agreed to, and did surrender his state controlled substance license. To date, the respondant's state controlled substance license has not been restored. Thus, since the respondant lacks state Authority in Utah the handle controlled substances, he is not entitled to a DEA registration for that state.

ORDER

Accordingly, it is this 25th day of April, 2002

ORDERED, that the government's motion for summary disposition be, and by the same herein is, GRANTED

Recommended Decision

In light of the foregoing, I recommend that the respondant's application for a DEA certificate of registration as a practioner, dated August 3, 2001, be denied.

Dated April 25, 2002

/s/ Gail A. Randall

Gail A. Randall
Administrative Law Judge

APPENDIX G

District Court Opinion
Judge Tena Campbell
Denying Defendant's Motion's
To Dismiss
Entered October 25, 2001

In the United States District Court for the
District of Utah
Central Division

Philip Washburn
Plaintiff ORDER

vs Case 2:01-CV-268C

United States Dept. of Justice
Drug Enforcement Agency, et.al
Defendants

On August 8, 2001, the defendants United States department of Justice, Drug Enforcement agency filed a motion to dismiss pursuant to Fed R. Civ P. 12 (b). The plaintiff failed to file a memorandum in opposition withint he 15 days after service as required by the District of Utah Civil Rule 7-1(b)(3). The plaintiff, however, filed an opposition on October 19, 2001. Failure to respond timely to a motion may result, but need not result in the court's granting the motion without further notice. DUCivR 7-1(d). As plaintiff is appearing pro se, the defendants proposed order granting defendant United States department of justice,

Drug Enforcement Agency motion to dismiss is DENIED.

Dated this 25 day of October, 2001

BY THE COURT

/s/ Tena Campbell

Tena Campbell
United States District Court Judge

APPENDIX H

Plaintiff Memorandum Supporting Motion to Dismiss Entered October 19, 2001

United States District Court
District of Utah, Central Division

Philip Washburn
Plaintiff

Case No 2:01-CV-268C

Vs

Memorandum supporting Plaintiff motion to dismiss DEA motion to dismiss

United States Department
Of Justice, Drug Enforcement
Agency, et.al.
Defendants

Comes now Philip Washburn, plaintiff presenting memorandum supporting motion to dismiss defendant DEA motion to dismiss.
Weeks v United States 232 US 383, 34 S Ct. 341, 58 L.Ed 652 (1914) bars the use, by federal authorities, evidence illegally obtained by any federal officer(s) in any prosecution. *Wolf v Colorado* 388 US 25, 69 S Ct. 1359, 93 L Ed. 1782 (1949).prohibits arbritrary intrusion by police. Warrentless invasion violates fourth amendment rights and is enforceable against state under the *Due Process Clause* therefore defendant(s) motion to dismiss should not be

granted. Utah Code Ann. 58-12-35.1 requires defendant State of Utah and the Division of Occupational and Professional licensing to give plaintiff 30 day notice of the charges against him and provide date and time of hearing to answer charges.

Defendant State of Utah and DOPL admit that no notice was ever prepared, mailed or delivered to plaintiff and that no hearing took place. Plaintiff had no knowledge of any criminal charges against him. Plaintiff was not given the opportunity of Due Process to answer criminal charges. Plaintiff never admitted any guilt or wrong doing. Illegal and unauthorized evidence obtained by defendant(s) caused harm and defamed plaintiff by denial of licensure to prescribe controlled substances.

Signed this 15th day of August, 2001
Filed October 19, 2001

/s/ Philip Washburn, M.D

Philip Washburn M.D. plaintiff

APPENDIX I

JURY DEMAND by Plaintiff
Entered February 21, 2003

In The United States District Court for the
District of Utah, Central Division

Philip Washburn MD
Plaintiff JURY DEMAND

vs.

Case 2:01-CV-268 PGC

Department of Justice
Drug Enforcement Agency et al
Defendants

Comes now plaintiff making jury demand pursuant to Utah Code Ann. 77-17-10 (1) trial by jury to establish fact of the deprivation of plaintiffs rights, under the color of law, by defendants, by review of third party expert witness testimony, cross examination, and evidence. Plaintiff makes jury demand pursuant to USC 42 section 1985 (3) 69 to determine recovery of compensory, punitive damages and damages for emotional distress caused by deprivation of plaintiffs civil rights by defendants, under color of law, against protected class, commanche Indian, plaintiff, who was legally prescribing controlled substances to chronic pain patients.

Signed this 21st day of February, 2003

/s/ Philip Washburn MD

Philip Washburn MD, Plaintiff

APPENDIX J

Utah Division of Occupational and Professional Licensing Investigative Report
950853-08461
In the Matter of Philip Washburn M.D.
David Bancroft, Agent

On June 4, 1996, I met with Philip Washburn MD at his medical office in Springville, Utah.

The meeting was to discuss and review several patients currently receiving large amounts of controlled substances, with ever increasing dosages. It was further discussed that according to Utah County Narcotic Enforcement Taskforce, that Washburn was well acquainted with substance abusers throughout the county. It as also learned through a narcotic detective with Utah County narcotic enforcement taskforce that he was advised by informants that by going to see Dr Washburn you can pretty much get anything you want by simply asking and paying for the office visit. Upon being interviewed Washburn agreed that he was a soft touch and he was about the only physician that would treat these patients.

Washburn reviewed several patient profiles and stated he in fact wrote them all. Several patients receiving high doses on a regular basis:

Kathleen Baxter-rhumatoid arthritis
Cara Bowles-discharged/substance abuse
Kathy Conger-cervical spine injury
Laurie Sorenson-head injury, auto accident
Brent Winters-chronic migraine headaches

Kathy Young-
Annette Hales-lower back
Randy Hales-discharged/substance abuse
Heidi Diamond-chronic kidney pain
Michael Fisk-double amputee below knee
Becky Johnson-neck and back injury

In closing, I advised Washburn that this investigation will continue and the possibility Of this investigation turning into a criminal matter was highly probable.

On June 7, 1996 I met with subject Philip Washburn MD accompanied by Charles Walton MD, DOPL recovery program manager. Dr. Walton purpose in attending was to observe and aquaint himself with DOPL investigations and, to review Washburn prescriptive practice validating responses for medical correctness. The interview, although lengthy was repetitive in question. Washburn replied appropriately as predicted. He contined stating he was a "soft touch" and with little or no exception tended to be an easy target with known abusers and doctor shoppers.

Washburn stated he generally believed his patients complaints. Although, many that were diagnosed with chronic pain syndrome most were without insurance and therefore were not able to afford psychiatric therapy, radiological testing, etc. Most simply paid their $ 40.00 office visit and received their prescription.

It was also noted that the quantity of drugs prescribed were extremely high in number. A review of patients revealed no consistant does.

Most patients were receiving escalating amounts and many with greater frequency. Again, Washburn's reply was these were chronic pain problem people and necessitated these high amounts.

In part, Washburn agreed and understood that a portion of his patients were probably not suffering chronic pain and were for the most part simply controlled substance abusers likely working him for drugs. As had been suggested previously we again discussed Washburn surrendering his controlled substance license.

Initially he adamantly refused stating he couldn't practice without it. However, upon closer examination it was believed by subject that he could function without it. However, DOPL diversion manager Charles Walton, MD began discussing the pro's of subject surrendering his controlled substance license. Subject without any inducements unilaterally decided to surrender his controlled substance license. Subject believed it was with his best interest in mind. He surrendered his license.

Washburn stated he would honestly be able to advise his chronic pain patients he could no longer prescribe any controlled substances. Washburn and Dr Walton discussed Washburns chronic pain patients. Dr Walton stated he would provide Washburn with information on the University of Utah pain program.

Without any further, Washburn surrendered his controlled substance license # 22-146051-9915. Washburn provided me his wallet copy of his

controlled substance license stating his wall copy was at a physicians office in St. George, where he stated he had left his larger controlled substance license when he had considered working at a clinic. Washburn stated he would obtain the license from St. George, Utah and mail it to DOPL.

In closing, I had Washburn sign a brief statement of surrender I prepared. I advised him I would obtain an official order and return on or about June 10, 1996 for his signiture.

/s/ David Bancroft, agent DOPL

David Bancroft, agent DOPL